Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), and Verizon Global Networks Inc., for Authorization To Provide In-Region, InterLATA Services in Massachusetts	)	CC Docket No. 01-9

REPLY COMMENTS OF THE

COMPETITION POLICY INSTITUTE

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REPLY COMMENTS OF THE COMPETITION POLICY INSTITUTE

The Competition Policy Institute (CPI) hereby submits these Reply Comments in the matter of Verizon's application to provide in-region interLATA service in Massachusetts. CPI is a non-profit organization that advocates policies to bring competition to telecommunications and energy markets in ways that benefit consumers. We appreciate the opportunity to reply to the comments of other parties in this important case.

I. Summary and Introduction

Section 251 of the Communications Act imposes requirements on incumbent telecommunications carriers that Congress believed would lead to a competitive marketplace for local exchange service. Chief among these requirements is that incumbent carriers make available to competitors elements of their network at cost-based prices. The Commission has interpreted this cost standard to mean that network elements must be priced using the cost standard of Total Element Long Run Incremental Cost (TELRIC), a standard established by the Commission and delegated by law to the states to implement.

While the requirements of Section 251 stand on their own, nowhere in the Communications Act does the Commission possess a stronger mechanism for enforcing those requirements than Section 271. A Bell Operating Company (BOC) may enter the long distance market in a state only if, among other requirements, the company provides non-discriminatory access to unbundled network elements at prices based on TELRIC. Of course, the FCC and the states may enforce the requirements of Section 251 through their general enforcement authority.

But only Section 271 enhances regulators' enforcement authority by offering the BOCs a positive incentive to comply with the market-opening provisions of the law. Congress assumed correctly that long distance entry is the brass ring of the 1996 Act. It is essential that the Commission take advantage of this linkage to enforce its *Local Competition* order by approving Section 271 applications only when the carriers are in strict compliance with Section 251. In effect, a Section 271 application is the Commission's best, and last, opportunity to ensure that a BOC enables local exchange competition through the prices it charges for unbundled network elements. Unless a local market is irreversibly open to competition with prices at cost-based levels, *when a Section 271 application is approved,* competition is jeopardized: following approval of a Section 271 application, the BOC will have lost much of its positive incentive to comply with the market-opening requirements.

Verizon's application and the comments filed in this case have engendered a furious debate about whether the Company's Massachusetts UNE prices are based on the correct application of the TELRIC methodology. In these Reply Comments, we focus on a specific and relatively narrow issue in the case: how the Commission should view Verizon's importation of the "New York" switching rates into the Massachusetts application. Our conclusion is that the Commission should accept the "New York" switching rates only if Verizon commits to revise the switching rates in Massachusetts following the completion of the New York Public Service Commission's investigation into the price of the local switching element. In other words, Verizon should be required to commit that the price for switching in Massachusetts will "follow" the price in New York, subsequent to approval of its application. We recommend that Massachusetts switching rates, if based on today's New York rates, be required to track those rates for at least

five years following approval of the Section 271 application for Massachusetts.

II. Verizon's Use of the "New York" Switching Rate in its Application Raises Substantial Doubts Whether The Competitive Checklist Has Been Met

As the record in this case establishes, Verizon elected to replace the rate for local switching contained in its original Massachusetts Section 271 application with the cost of local switching approved by the New York Public Service Commission for use in New York. The original switching rates, which emanated from a proceeding in Massachusetts, had become subject to substantial criticism because they were obviously out of line with switching rates adopted in other states. For a number of reasons (including procedural concerns raised by amending the switching rates after the application was filed) Verizon withdrew and refiled its application.

In proffering the "New York" switching rates in the Massachusetts Section 271 application, Verizon essentially advances the following syllogism: the New York Commission found the switching rate to be based on TELRIC principles; in approving the New York Section 271 application, the FCC found that the New York switching rates were within the range of TELRIC; the conditions in Massachusetts are similar to the conditions in New York; therefore, the "New York" rates, applied in Massachusetts, are consistent with the TELRIC methodology. But the links in this syllogism are tenuous.

In its comments, AT&T argues that Verizon's importation of the New York switching rate means plainly that the switching rate has not been found to be based on TELRIC principles in

Massachusetts[1]. AT&T also argues that the conditions under which the Commission might rely on UNE prices in other states in a region, conditions identified in the *Kansas/Oklahoma Order*[2], have not been met in this application.[3]

Since it is manifestly true that different states have adopted different rates for the switching element (all alleged to be based on the TELRIC standard), it is not clear whether a re-examination of switching rates in Massachusetts, conducted by the Massachusetts DTE, would have produced rates within the range of those imported from New York. Such a review might well have produced different switching rates, given new evidence that has been brought forward by new entrants in Massachusetts and New York. For this reason, the Commission's record does not appear to contain sufficient evidence that the New York rates represent TELRIC-based prices in Massachusetts. We agree with the commenters who argue that the Commission would be justified in denying the application on the basis that the Company has not shown the prices for the switching element are based on the TELRIC standard.

III. If the Commission Accepts the "New York" Switching Rates, It Must Require That Verizon Adjust the Rates Following Subsequent Orders of the New York Public Service Commission

While the Commission has a legal basis to conclude that Verizon has not met its burden to

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[1]Comments of AT&T at pp. 11-16. *See also* Comments of Worldcom at 11.

[2]*Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Service in Kansas and Oklahoma*, CC Docket No. 00-217, Memorandum Opinion and Order released January 22, 2001 ("*Kansas/Oklahoma Order*")

[3]Comments of AT&T at p. 17.

establish that its application meets the competitive checklist, we realize that the Commission might conclude that the use of switching rates approved in New York results in rates that are "within the range of TELRIC" in Massachusetts. But the same logic that allows the Commission to accept the "New York" rates as valid for Massachusetts demands that the Commission require that those rates follow the New York rates as they are adjusted by the New York PSC.

There are several compelling reasons why the Commission should take this course. First, if New York and Massachusetts have cost, engineering and regulatory similarities that permit regulators to "borrow" cost analysis from one state and apply it to another, these similarities will apply in the future to UNE costs as well as they apply today. These similarities, identified in the recent *ex parte* filing of Verizon,[4] mean that the UNE prices that the New York PSC eventually determines to be permanent prices in New York will apply with equal validity to Massachusetts in the future. Indeed, to the extent that future revised prices differ from current prices, the Commission must conclude that the then-existing Massachusetts prices for switching will be wrong. If the Commission decides to accept the New York prices in this case, an obvious, and compelling, fix for this potential future problem is to link Massachusetts prices to the analysis of the New York PSC.

Second, there is credible evidence in the record that the New York Public Service Commission will likely adjust the switching rates in New York.[5] Worldcom and AT&T have alleged numerous areas in which the New York Commission's previous analysis will have to be

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[4]*Ex parte* submission of Verizon to Commission Staff members McKee, Lien, et al., dated February 15, 2001, p.2.

[5]Comments of Worldcom at pp. 15-16 and AT&T at 9.

revised to accommodate new information. For local switching costs, the most significant of these issues appears to be whether the New York Commission had complete information about the switch vendor discounts available to Verizon. CPI has not been a party to the UNE cost cases in either New York or Massachusetts and is not, for that reason, able to predict what the outcome of the New York Commission's effort might be. On the other hand, these issues appear to be substantial enough to make potentially significant differences in the outcome. Knowing that these outstanding issues exist must inform the Commission's judgment in this case. Again, the most efficient approach, short of denying the application, would be to view the Massachusetts UNE prices, like the New York prices earlier, to be subject to modification upon completion of the New York PSC's investigation.

Third, in approving Verizon's New York Section 271 application, the Commission acknowledged that the rates being approved were interim rates, and that the UNE price levels were under review in New York. This means that the FCC was actually approving less a set of specific rates and more nearly a *process* in New York that would arrive at prices which faithfully reflected the TELRIC standard. That process of refining its UNE prices is still underway in New York. It would be inconsistent for the Commission to accept *permanent* rates in Massachusetts that are tied to rates developed *mid-process* in New York. To the extent the Commission countenanced a process that relied on the expertise and diligence of the New York PSC to produce UNE prices that reflect the TELRIC standard in New York, no less a standard should be applied in Massachusetts.

Finally, the New York Public Service Commission is widely regarded as having substantial expertise in determining costs of unbundled network elements. In the same way that the

Massachusetts DTE acknowledged the diligence of the New York PSC and the validity of its cost determination by permitting the use of the New York switching rate in Massachusetts, so too should the FCC acknowledge the validity of the New York Commission's ongoing review of those costs.

We anticipate that Verizon may object that the Commission cannot link Massachusetts switching rates to the future action of another state's regulatory agency. But that objection is trumped by Verizon's own choice to do just that: the Company has already borrowed the New York result for its Massachusetts application. So that this stratagem doesn't become a version of "bait and switch," Verizon should accede to the requirement that the Massachusetts switching prices track the action of the New York PSC. Suppose, contrariwise, the Commission does not link the Massachusetts switching rates to the adjusted New York rates. In this case the Commission will have endorsed rates for the switching element in Massachusetts that are no longer underpinned by the findings of *any* regulatory commission. Clearly, this is an untenable position that the Commission must avoid.

IV. Conclusion

The Commission should not accept Verizon's claim that local switching rates in Massachusetts are compliant with the TELRIC standard merely because the Commission accepted interim rates at the same level in the New York Section 271 application. As pointed out by several commenters, the circumstances in Massachusetts differ from those in New York in important respects. This means that the Commission probably has the legal authority to find that Verizon has not met its burden for the competitive checklist. However, if the Commission

decides to accept the current New York switching rates as a surrogate in Massachusetts, the Commission should also require Verizon to adjust those rates in the future following the anticipated decision of the New York Public Service Commission in its current investigation of UNE prices in New York.

Respectfully submitted,

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